BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **LEE KENDRICK** From dismissal from the position of Transportation Surveyor with the Department of Transportation at Ventura	)	SPB Case No. 04-1620A **BOARD DECISION** (Precedential) **NO. 06-02** October 31, 2006

APPEARANCES: Gerald James, Labor Relations Counsel, Professional Engineers in California Government, on behalf of appellant, Lee Kendrick; Raymond B. Barrera, Deputy Attorney, on behalf of respondent, Department of Transportation.

BEFORE: Sean Harrigan, Vice-President; Anne Sheehan and Maeley Tom, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board granted Lee Kendrick's (appellant) Petition for Rehearing. Appellant was dismissed from his position as a Transportation Surveyor with respondent Department of Transportation (Department), based on allegations that: (1) appellant shouted at and threatened his supervisor; (2) a search of appellant's person revealed that he was in possession of methamphetamine; and (3) a search of appellant's vehicle revealed that he was in possession of a handgun with two loaded magazines, loose rounds of ammunition, a small amount of marijuana, and a $20 bill rolled into a straw. As a result of the search, appellant was arrested and booked for making terrorist threats, disturbing the peace, possession of a concealed weapon in a vehicle, possession of a controlled substance; possession of drug paraphernalia, and possession of less than one ounce of marijuana. All criminal charges were ultimately dismissed against appellant, however, after the

superior court ruled that the weapons and narcotics evidence had been obtained as the result of an illegal search and seizure.

In this Decision, the Board finds that the weapons and narcotics evidence was obtained as the result of an unlawful search and seizure and are not admissible in Board proceedings. As a result, the Board dismisses those allegations. The case is remanded to the Chief Administrative Law Judge (ALJ) for re-assignment to a different ALJ on the issue of whether appellant shouted at and threatened his supervisor and, if so, for a determination of the appropriate penalty for such misconduct.

ISSUE

Is evidence that was obtained in violation of appellant's Fourth Amendment right against unreasonable searches and seizures, and that has been deemed inadmissible in state criminal proceedings, admissible in administrative disciplinary proceedings against appellant?

BACKGROUND

Employment History

Appellant was appointed to the position of Associate Land Surveyor with the Department on August 3, 1998. On January 1, 2000, appellant was appointed to the Transportation Surveyor classification within the Department.

FINDINGS OF FACT

According to the Department, on July 2, 2004, appellant's supervisor, Department Transportation Survey Party Chief Michael McBarron (McBarron), instructed appellant to clean out the Department vehicle that appellant had used the previous day. Appellant responded by shouting that he did not like the way that McBarron had spoken to him and said, "You treat me like an apprentice. The way you

talk to me, I could knock you out." When McBarron asked if appellant was threatening him, appellant replied, "The way you talk to me, I could pull your hair out." After McBarron stated that appellant had threatened him, appellant replied, "No I didn't. Prove it."[1] Appellant then proceeded out to the field to continue with his workday.

As a result of his altercation with appellant, McBarron notified Senior Transportation Surveyor Henry Figueroa (Figueroa) that appellant had threatened him, and asked Figueroa to report the matter to law enforcement. Figueroa then contacted the Department of the California Highway Patrol (CHP), and CHP Officer John Larson (Larson) was dispatched to the scene.[2] After meeting with McBarron, Larson proceeded to appellant's work location.

Upon arriving at appellant's work location, Larson placed appellant under arrest for the following Penal Code violations: Terrorist threats (Penal Code section 422); and Fighting, noise, offensive words (Penal Code section 415). Larson thereafter conducted a search of appellant's person, during which he discovered a brown glass vial that contained 1.1 grams of methamphetamine. Larson also searched appellant's vehicle. During that search, Larson discovered a handgun contained in a "fanny pack," with two loaded magazines (one with four rounds of ammunition, one with eleven rounds of ammunition), as well as 23 loose rounds of ammunition. Larson also discovered a small amount of marijuana contained in a wooden case, and a $20 bill that had been rolled into a straw. According to the Department, when Larson asked appellant if he

[1] In this Decision, the Board makes no findings as to the accuracy of the Department's allegations concerning appellant's statements to McBarron.

[2] The CHP is the law enforcement entity charged with investigating crimes that occur in state facilities. (Vehicle Code section 2400(g).)

used the $20 bill to ingest the methamphetamine, appellant replied, “Only when I’m not smoking it.”

Larson transported appellant to the Ventura County Jail, where appellant was booked on the following charges: Terrorist Threats (Penal Code section 422); Disturbing the Peace (Penal Code section 415); Concealed Weapon in a Vehicle (Penal Code section 12025(a); Possession of a Controlled Substance (Health & Safety Code section 11377); Possession of Drug Paraphernalia (Health & Safety Code section 11364(a); and Possession of Less than One Ounce of Marijuana (Health & Safety Code section 11357(b)).

The Office of the Ventura County District Attorney (District Attorney) thereafter pursued criminal charges against appellant in the Superior Court for the County of Ventura (Case No. 2004025828.) On December 14, 2004, appellant filed a Motion to Suppress Evidence in Department 45 of the Ventura County Superior court, pursuant to the provisions of Penal Code section 1538.5. The District Attorney filed an Opposition to appellant’s motion, and the matter was heard on December 24, 2004. After hearing the matter, the court granted appellant’s Motion to Suppress Evidence, finding that the weapons, narcotics, and drug paraphernalia evidence had been obtained as the result of an unconstitutional search and seizure. On March 1, 2005, the court granted the District Attorney’s motion to dismiss all charges against appellant, on the grounds that the allegations could not be proven beyond a reasonable doubt.

The Department thereafter served appellant with a Notice of Adverse Action, dismissing him from his position as a Transportation Surveyor, effective July 20, 2004. As cause for the dismissal, the Department alleged that: appellant shouted at and

threatened his supervisor; was in possession of methamphetamine, marijuana, and drug paraphernalia while at work; and was in possession of a firearm and ammunition at work. The Department alleged that appellant's conduct constituted violations of the Department's Workplace Violence, Weapons, and Drug Free Workplace policies. The Department further alleged that appellant's actions constituted legal cause for discipline pursuant to Government Code section 19572, subdivisions (c) inexcusable neglect of duty;[3] (e) insubordination; (m) discourteous treatment of the public or other employees; (o) willful disobedience; and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Appellant filed an appeal of his dismissal with the Board in SPB Case No. 04-1620. Prior to conducting a hearing on the merits concerning the Department's allegations, the ALJ ruled that the Department was not barred from presenting evidence concerning the illegally seized narcotics and weapons evidence. Appellant filed a Petition for Rehearing with the Board concerning the ALJ's ruling. The Board granted appellant's Petition, and now issues this Decision concerning the matter.

PRINCIPLES OF LAW

The Fourth Amendment of the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

[3] Government Code section 19572, subdivision (c) relates to "inefficiency," not inexcusable neglect of duty. Subdivision (d) concerns "inexcusable neglect of duty."

> and particularly describing the place to be searched, and the persons or things to be seized.

As a general rule, evidence that has been obtained in violation of Fourth Amendment guarantees must be excluded from admission in subsequent judicial and quasi-judicial proceedings, as the basic purpose of the Fourth Amendment is to deter unconstitutional methods of law enforcement.[4] "By denying any profit from the unconstitutional methods of law enforcement, it is to be anticipated that law enforcement officials will have no incentive to engage in such methods."[5] Exceptions to the exclusionary rule do, however, exist.

During 1970, the California Supreme Court issued *In re Martinez*,[6] wherein the court concluded that evidence obtained in violation of a parolee's constitutional rights, and which had been excluded from his criminal trial, could nevertheless be used against the parolee during a subsequent parole revocation hearing. In so ruling, the court specifically noted that: the search was conducted by regular law enforcement officers pursuant to their general law enforcement duties; the officers were not aware of the individual's status as a parolee at the time of the search; and the investigation involved suspected criminal activity, not parole violations. In ruling that the otherwise illegally obtained evidence was admissible for parole revocation hearing purposes, the court specifically found that:

> The critical responsibilities of the administration of the parole system require that the Adult Authority generally be permitted to consider all relevant evidence. ¶ Although we

[4] *Elkins v. United States* (1960) 364 U.S. 206, 217, 4 L.Ed.2d 1669, 1677, 80 S.Ct. 1437, 1453.

[5] *People v. Moore* (1968) 69 Cal.2d 674, 682.

[6] (1970) 1 Cal.3d 641.

> recognize that theoretically the exclusion of the products of illegal searches and interrogations from Adult Authority proceedings would supplement the deterrent force of the criminal trial exclusionary rules, we must also consider the unique nature and responsibilities of the Adult Authority and the extremely high costs which the expanded application of the exclusionary rule would entail in this context.

After reviewing the record before it, the court concluded that the incremental deterrent effect that could be achieved by precluding use of the illegally obtained evidence at the parole revocation hearing would be slight, particularly as the "bungling" police officer will have given little to no thought that his illegal actions might hinder the state's ability to revoke an individual's parole.[7] As a result, the court ruled the exclusionary rule to be inapplicable to the parole revocation hearing.

Four years later, the California Supreme Court issued *Emslie v. State Bar*,[8] wherein the court concluded that evidence that had been illegally seized by Nevada law enforcement officials during an investigation concerning criminal activity by a California attorney, and that was precluded from use in Nevada criminal proceedings, could nevertheless be used against the attorney in California State Bar administrative disbarment proceedings. In so ruling, the court found that "the public, as well as the legal profession and the courts, must be protected from those attorneys who do not measure up to their professional responsibilities," and that the "purpose of disbarment proceedings is not to punish the individual, but to determine whether the attorney should be permitted to continue in that capacity."[9] In ruling the illegally obtained evidence

[7] *Id*. at 649-650.

[8] (1974) 11 Cal.3d 210.

[9] *Id*. at 225.

admissible during administrative disbarment proceedings, the court concluded that application of the exclusionary rule would have had virtually no deterrent effect upon the officers conducting the search, as those officers were not aware of Emslie's status as an attorney, nor would they probably contemplate the consequences that an arrest and conviction might have on any professional disciplinary proceedings that might emanate from the arrest and/or conviction.[10]

During that same year, California's Second Appellate District, issued *Governing Board v. Metcalf*,[11] wherein the court concluded that evidence that had been illegally obtained and excluded from a criminal prosecution, could be used in administrative proceedings concerning a sixth grade probationary teacher's fitness for service. In finding the evidence admissible, the court noted that the law has long recognized that children are entitled to special protection, particularly during the process and period of their compulsory education, and that the review proceedings concerned alleged immoral conduct by the teacher. As a result, the primary purpose of the hearing was not to punish the teacher, but to protect those pupils entrusted to his care.[12]

The Second Appellate District subsequently issued *Pating v. Board of Medical Quality Assurance*,[13] in which the court determined that the exclusionary rule should not be applied to preclude the admission into evidence during administrative disciplinary proceedings of medical records that had been obtained illegally, but in good faith, by an

[10] *Id*. at 229.

[11] (1974) 36 Cal.App.3d 546.

[12] *Id*. at 550-551.

[13] (1982) 130 Cal.App.3d 608.

investigator. In so ruling, the court concluded that application of the exclusionary rule would have no deterrent effect, because the investigator could not reasonably have foreseen that the manner in which he obtained the records was illegal.[14]

In *Dyson v. State Personnel Board*,[15] however, California's Third Appellate District ruled that evidence that had been illegally obtained by California Department of the Youth Authority (CYA) personnel as the result of an unconstitutional search of a CYA employee's home, and which had been excluded from use in criminal proceedings against the employee, could not be used in subsequent administrative disciplinary proceedings before the Board. In distinguishing *Emslie* and *Metcalf*, the court noted that, whereas the illegal searches in *Emslie* and *Metcalf* were conducted by police officers not affiliated with the administrative agency seeking to utilize the evidence, in *Dyson*, CYA personnel conducted the illegal search, and thereafter attempted to discipline the employee on the basis of the illegally obtained evidence.[16] As a result, given the facts presented, the court found that the exclusionary rule's deterrence policy would be served by application of the rule to the Board's administrative disciplinary proceedings.

One year later, the Third Appellate District issued *Finkelstein v. State Personnel Board*,[17] wherein the court found that evidence obtained in contravention of Fourth Amendment dictates could be used in Board proceedings. That case involved a

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[14] *Id*. at 625.

[15] (1989) 213 Cal.App.3d 711.

[16] *Id*. at 719.

[17] (1990) 218 Cal.App.3d 264.

situation where a state employee's supervisor discovered incriminating evidence concerning the employee during a routine search of the employee's office for confidential work-related documents. Although the evidence was discovered in the employee's personal briefcase, the court found the exclusionary rule to be inapplicable because, unlike in *Dyson*, the supervisor was not motivated by a desire to uncover evidence damaging to the employee, but instead was simply attempting to locate work-related documents. Under such circumstances, application of the exclusionary rule would have no deterrent effect on the supervisor.

ANALYSIS

The relevant case law reveals that the primary question to be addressed when determining whether the exclusionary rule should be applied to any particular case is this: Would application of the rule have an ample deterrent effect on the person conducting a search, such that the person will refrain from conducting a search in a manner that violates constitutional requirements? After reviewing all the facts presented here, we conclude that application of the exclusionary rule is warranted in this case.

We note, as an initial matter, that unlike *Dyson*, the search in question here was not conducted by a Department employee, but instead was conducted by a CHP Officer who had been called to the scene by a Department supervisor. We further recognize that the Department had no authority to direct the CHP Officer regarding the manner in which he would conduct his investigation. Nevertheless, law enforcement officer conducting the unconstitutional search, having been summoned by the Department,

could reasonably anticipate that both criminal proceedings, and administrative disciplinary proceedings, might very well be based on his investigative findings.

Pursuant to Vehicle Code section 2400(g), the CHP is the law enforcement entity tasked with responding to and investigating crimes that occur at state worksites, including possible criminal conduct by state employees. Because CHP Officers are state civil service employees themselves, the Board believes it likely that Officer Larson was well aware of the fact that his investigation into alleged criminal conduct by appellant at the workplace could result in both a criminal prosecution of appellant, as well as administrative disciplinary proceedings. Therefore, much like the situation presented in *Dyson*, and unlike the circumstances in *In re Martinez*, *Emslie* and *Metcalf*, we conclude that application of the exclusionary rule to these proceedings will have a strong deterrent effect on CHP Officers in the future when they conduct investigations into possible criminal misconduct by state employees at state worksites.

In addition, *Metcalf* specifically recognized the special protection that the law affords children, and noted that the purpose of the teacher's administrative hearing was not to punish the teacher, but to protect those pupils entrusted to his care. In this case, however, although protection of the public and other employees certainly may be a factor underlying disciplinary proceedings before the Board, the primary purpose of these proceedings is to discipline the employee for alleged misconduct. As such, the instant case is distinguishable from the rationale set forth in *Metcalf*.

The facts of this case are similarly distinguishable from those presented in *Pating* and *Finkelstein*, *supra*. In *Pating*, an investigator from the Department of Consumer Affairs obtained patient records by means of a subpoena duces tecum issued to several

health care providers, who did not assert any privilege to records and simply turned over the records to the investigator.[18] Under those circumstances, the court concluded that it was not unreasonable for the investigator to believe that the documents had been properly obtained, and that application of the exclusionary rule would have no deterrent effect on the investigator's conduct. Here, however, the search was not conducted pursuant to a valid subpoena or as the result of Larson going through other legal channels to obtain the evidence in question. Instead, the search was the direct result of Larson's on-the-scene decision to arrest appellant, and to thereafter search appellant and his vehicle.

Likewise, in *Finkelstein*, the court determined that application of the exclusionary rule was not appropriate because the person conducting the search was not motivated by a desire to uncover evidence damaging to the employee, but instead was motivated by a desire to locate work-related documents. Discovery of the evidence demonstrating misconduct by the employee was merely happenstance. In this case, though, Larson's search was directly motivated by a desire to uncover evidence damaging to appellant and, but for the search, such evidence would not have been discovered. Consequently, the instant case is distinguishable from *Finkelstein*.

In finding that application of the exclusionary rule is required in this case, we are not unmindful of the type of evidence that is being excluded from the Board's consideration. State employees who bring narcotics and weapons onto state property

[18] After being informed about the disclosure of their records without their consent having first been obtained, the patients did not object to the disclosure of their records and subsequently testified in the administrative proceedings.

cause great discredit to the public service, and may pose a significant danger to the public and other employees. As a result, we do not arrive at our decision lightly. Nevertheless, after carefully considering the facts presented in this case, and after careful consideration of applicable case law, we conclude that the law compels a determination that the exclusionary rule must be applied in this case to preclude the admission into evidence of that narcotics and weapons evidence that had been obtained against appellant by means of an unconstitutional search.

We further find that, although the narcotics and weapons evidence must be excluded from the instant case, allegations concerning threats purportedly made by appellant to his supervisor remain at issue. Therefore, this case must be remanded so that a hearing may be conducted as to those allegations.

CONCLUSION

Narcotics and weapons evidence that has been obtained against appellant as a result of an unconstitutional search must, pursuant to the exclusionary rule, be excluded from disciplinary proceedings before the Board, as exclusion of the evidence will have a significant deterrent effect on CHP Officers conducting searches at state worksites in the future. Allegations concerning threatening statements made by appellant to his supervisor, however, remain unresolved. As a result, remand of the case for a hearing on those issues is warranted.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

(1) The narcotics and weapons evidence deemed inadmissible by the Ventura County Superior Court in Case No. 2004025828, is hereby excluded from proceedings before the Board; and

(2) The case is remanded to the Chief Administrative Law Judge for hearing before a different Administrative Law on all remaining allegations contained in the Notice of Adverse Action

(3) This decision is certified for publication as a Precedential Decision.

(Government Code § 19582.5)

STATE PERSONNEL BOARD[19]

Sean Harrigan, Vice President
Anne Sheehan, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 31, 2006.

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Floyd Shimomura
Executive Officer
State Personnel Board

[19] President William Elkins and Member Patricia Clarey did not participate in this Decision.